



SUPREME COURT OF THE UNITED STATES

JOHN T. POWERS,

Plaintiff in Error,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR UPON MOTION TO DISMISS WRIT OF ERROR.

This cause comes in error to the Circuit Court of the United States, for the District of Kentucky. The error complained of is the overruling of a motion to remand to the state court a cause that had been removed from the state court to the United States Circuit Court, for the District of Kentucky, upon the ground of diverse citizenship of parties plaintiff and defendant to the suit.

The case is certified to this Court, by the Circuit Court of the United States, for the District of Kentucky, upon the question of jurisdiction alone, under the provisions of Section 5 of the act of Congress establishing Circuit Courts of Appeal, March 3, 1891, 26 U. S. Statutes, page 827.

This hearing is upon motion filed by defendant in error, to dismiss the proceedings in error herein, because there is no issue of the jurisdiction of the Circuit Court of the United States, for the District of Kentucky, involved therein.

STATEMENT.

On the 14th day of April, 1893, John T. Powers, plaintiff in error herein, brought suit in the Circuit Court of Kenton County, Kentucky, against The Chesapeake & Ohio Railway Company, defendant in error herein, and David Evans, to recover the sum of twenty-five thousand dollars damages, for injuries alleged to have been sustained by the plaintiff in said suit through the alleged negligence of the defendants.

The petition alleged that the individual defendant was the agent and employe of the corporation defendant; that plaintiff's alleged injuries were caused by the negligence of the individual defendant, for which negligence both the individual and corporation defendant were liable.

On the 29th day of April, 1893, The Chesapeake & Ohio Railway Company filed its petition and bond in the state court for the removal of said cause to the United States Circuit Court, for the District of Kentucky, upon the ground of diverse citizenship of parties plaintiff and defendant. The Kenton Circuit Court accepted the petition for removal and approved the bond. The Chesapeake & Ohio Railway Company in due time filed in the United States Circuit Court, for the District of Kentucky, a transcript of the record from the state court.

The plaintiff in the case, John T. Powers, filed in the United States Circuit Court an answer to the petition of removal, controverting the allegations of diverse citizenship of parties plaintiff and defendant to said suit, and moved to remand the case to the state court. The Court heard and determined the question of citizenship in favor of the defendant in the case, and overruled plaintiff's motion to remand. Thereupon plaintiff dismissed his suit.

These facts appear in the opinion of the Circuit Court herein. (Pages 43, 44, and also transcript pages 32 to 43 of the Record).

After dismissing his suit in the United States Circuit Court, the plaintiff, on the 7th day of September, filed a new petition on the same cause of action in the Kenton Circuit Court of Kentucky, in which he made defendants, not only The Chesapeake & Ohio Railway Company and David Evans, who had been defendants in the first suit, but also W. D. Boyer and Edward Hickey, alleging that Boyer was a conductor, Evans an engineer, and Hickey a switchman in the employ of the defendant corporation, that he had been injured by their gross negligence, and asking damages against all of the defendants in the sum of twenty-five thousand dollars. (Rec., page 43).

The Chesapeake & Ohio Railway Company, before its answer was due under the law of Kentucky, filed its petition and bond in the state court for the removal of the case to the United States Circuit Court for the District of Kentucky, alleging that the amount in controversy exceeded, exclusive of interests and costs, the sum of two thousand dollars; that there was a diverse citizenship of parties plaintiff and defendant, The Chesapeake & Ohio Railway Company; that the defendants, Boyer, Evans and Hickey, were fraudulently and improperly joined as parties defendant, for the sole purpose of defeating the right of the petitioner to remove said cause to the United States Circuit Court. (Rec., p. 3). The state court accepted the petition, and approved the bond for removal. (Rec., p. 4).

On the first day of the next term of the United States Circuit Court (December Term, 1893), the petitioner for removal filed in that Court a transcript of the record from the state court. (Rec., p. 1). On the 14th day of December, 1893, the plaintiff, John T. Powers, filed an answer to the petition of removal, denying the allegations of diverse citizenship contained in said petition, and denying that the other defendants in said cause, or any of them, were improperly or fraudulently joined as defendants, for the

purpose of defeating the petitioner's right to remove said case to the United States Circuit Court, and moved to remand the case to the state court. (Rec., pages 4 and 5).

Upon hearing in the United States Circuit Court, the motion to remand was granted and the case was remanded to the state court. (Rec., pages 6, 7, 8, 9, 10, 11, 12, 13, 14, 15).

After the case was remanded to the state court, The Chesapeake & Ohio Railway Company filed its answer in the state court, controverting all the allegations of negligence set up in the petition. (Rec., p. 15).

On the 16th day of October, 1894, the defendant, The Chesapeake & Ohio Railway Company filed an amended answer, setting up the defense of contributory negligence. (Rec., p. 20). To this amended answer plaintiff replied, controverting the allegations of contributory negligence on the part of the plaintiff. (Rec., p. 19).

On the 16th day of October, 1894, after the issues were joined, *the plaintiff, upon his own motion, dismissed the case as to all the defendants, except The Chesapeake & Ohio Railway Company.* The case then stood for the first time a suit involving a controversy wholly and solely between the plaintiff, a citizen of Kentucky, and the defendant, The Chesapeake & Ohio Railway Company, a corporation organized under the laws of Virginia and West Virginia.

The defendant, The Chesapeake & Ohio Railway Company, immediately, on the same day, to-wit: October 16th, 1894, filed in the state court, another petition and bond for the removal of the case to the United States Circuit Court, for the District of Kentucky.

This petition for removal alleged that the amount in controversy exceeded two thousand dollars; that the suit involved a controversy wholly between citizens of different states. It made the allegation of diverse citizenship of parties plaintiff and defendant; that when the suit was

originally brought the plaintiff had fraudulently and improperly joined other parties as defendants, for the purpose of defeating the petitioner's right to remove the cause to the United States Court; that because such of joinder the cause had been remanded to the state court; that the plaintiff had, on the 16th day of October, after the case had been remanded and issue had been joined in the state court, dismissed the suit as to all the defendants, except The Chesapeake & Ohio Railway Company, and that the case on that date, October 16th, 1894, was for the first time a suit pending against The Chesapeake & Ohio Railway Company alone. (Rec., pages 17, 18 and 19).

The state court refused to approve the bond for removal, "*but not for lack of sufficiency thereof*," and refused to remove the case. (Rec., page 17). A jury was, on the same day, October 16th, impaneled. The case was tried, resulting in a verdict against The Chesapeake & Ohio Railway Company in the sum of ten thousand dollars. (Rec., page 21). The company excepted to the verdict, and prayed an appeal to the Court of Appeals, and executed its supersedeas bond to stay execution. (Rec., page 25).

On December 3d, 1894, the first day of the December Term, 1894, of the Circuit Court of the United States, the said term being the first term of said Court after the filing in the state court of the petition for removal of the cause to the United States Circuit Court, The Chesapeake & Ohio Railway Company filed in said Circuit Court of the United States, a transcript of the record in the state court. (Rec., page 7).

On the 8th day of December, 1894, the plaintiff moved the Court to remand the case to the state court.

The grounds of the motion to remand were:

First. That the case was not removable from the state to the federal court.

Second. That the petition and bond were not filed within the time fixed by law for the filing thereof.

Third. That the question raised by the petition for removal had theretofore been adjudicated by the United States Circuit Court, and such adjudication was relied on in bar to the last removal proceeding. (Rec., page 27).

The plaintiff filed answers to the petition for removal, but did not controvert the allegations of jurisdictional amount, and diverse citizenship of parties plaintiff and defendant. (Rec., pages 28, 31). The only issue made was as to fraudulent conduct of plaintiff in state court, which prevented an earlier filing of the petition for removal in the state court. Two affidavits were filed (Rec., pages 26, 27) and the transcript of the record in the first removal suit. (Rec., pages 32 to 43 inclusive). Upon the issue thus joined, the motion to remand was submitted, on the pleadings and evidence.

On January 7th, 1895, the Court overruled the motion to remand, upon the ground that the plaintiff had, by fraudulent devices and conduct, in the state court, prevented the defendant from filing his petition for the removal of the cause to the United States Circuit Court prior to the day on which it was filed, and that therefore the plaintiff was estopped from objecting to the time of its filing. (See Opinion of Court, Rec., pages 43 to 54). The Court then approved the bond for removal which had been tendered by the defendant in the state court.

On December 9th, 1895, the plaintiff filed in the case a plea in abatement to the defendant's right to maintain the case in the United States Circuit Court. This plea in abatement set out that, after defendant had filed its petition and bond for removal in the state court, and after the state court had refused to approve the bond or order the removal, that defendant excepted to said order, and that thereafter the cause was tried and a verdict and judgment rendered against the defendant in the state court; that the defendant took part in said trial; filed in the state court

its motion for a new trial ; prayed an appeal to the Court of Appeals of Kentucky ; executed a supersedeas bond, superseding the judgment in the state court ; presented its bill of exceptions to the state court, and had the Court approve and sign the same, which facts the plaintiff plead in abatement of the cause in the Circuit Court of the United States and against the jurisdiction of said Court. (Rec., pages 55 and 56).

On December 10th, 1895, the plaintiff filed a motion to remand the case to the state court, basing said motion upon his plea in abatement, and at the same time filed a motion that all further proceedings in the case in the Circuit Court of the United States be delayed until the final termination of the case in the state courts of Kentucky. (Rec., page 56).

The Chesapeake & Ohio Railway Company demurred to plaintiff's plea in abatement, which demurrer was sustained by the Court, the plaintiff excepting. The Court overruled the motion to defer proceedings. (Rec., pages 56 and 57).

On December 10th, 1895, the plaintiff renewed his motion to remand the case to the state court, which motion the court overruled, plaintiff excepting.

On February 14th, 1896, the case was called for trial in the Circuit Court of the United States for the District of Kentucky. The plaintiff still insisting upon his objection to the jurisdiction of the Court, declined to recognize such jurisdiction or to prosecute his suit in said Court, or to proceed further with said cause in said Court, and the Court being of opinion that the plaintiff's petition did not state a good cause of action, adjudged that the action be dismissed at plaintiff's costs, to which ruling plaintiff excepted, and filed his petition for a writ of error to this Court upon the ground alone that the case was not properly removed from the state court to the United States Cir-

cuit Court for the District of Kentucky, and that the United States Circuit Court for the District of Kentucky was without jurisdiction over said cause.

The writ of error was allowed, and the cause was certified to this Court *upon the question of jurisdiction alone.* (Rec., page 58),

The defendant in error contends :

That there is no jurisdictional question raised in this case, such as will justify, or permit this court, under Section 5 of the act establishing Circuit Courts of Appeal, 26 U. S. Statutes, 827, to entertain these proceedings in error, or to review the judgment of the Circuit Court in this cause.

The record in the case shows that there is no dispute upon the following points :

1st. That when the defendant in error filed its petition in the state court for the removal of the case to the Circuit Court of the United States, (to-wit, on October 16, 1894,) the amount in controversy was sufficient to warrant the removal.

2d. That when the defendant in error filed its petition for removal in the state court (to-wit, October 16, 1894,) the controversy in the suit existed wholly between citizens of different states, that is, between the plaintiff in the case, who was a citizen of the state of Kentucky, and the defendant, which was a corporation organized under the laws of the states of Virginia and West Virginia.

In neither of the answers filed by the plaintiff in error, in the Circuit Court of the United States, to the petition for removal, are the allegations of jurisdictional amount, or diverse citizenship of parties plaintiff and defendant, controverted. (See answers, Rec., p. 28, 31).

The jurisdictional questions, of amount in contro-

versy, and diverse citizenship of parties plaintiff and defendant, stand conceded.

It follows, the jurisdictional question of amount being admitted, and the jurisdictional question of citizenship being admitted, that the only question that remains for the consideration of the Court is, whether or not the petition for removal was filed in the state court in proper time.

The determination of this question does not, we submit, involve a question of *jurisdiction*, but only a question of mode or procedure that may be controlled by the conduct of the parties to the suit.

The Court, in passing upon such a question, and in deciding what effect or weight shall be given to the acts or conduct of the parties to the suit, affecting the removal of a particular case, must determine the questions according to the same principles of law that guide the Court in construing any other act or conduct of parties litigant, which arises before or during the progress of a trial. Such a judgment of the Court may involve error, which will be the subject of review in an appellate court, but such a question is not one that affects the jurisdiction of a court that is established by statutory enactment, and which can neither be broadened nor narrowed by any act or conduct of parties litigant.

This Court, in construing the removal act, has frequently held that part of said act was purely jurisdictional, and part was modal or formal.

That the jurisdictional conditions *are indispensable, and must be shown by the record.*

That the modal or formal part of the statute, while, to a certain extent obligatory, may be waived.

Ayers v. Watson, 113 U. S., 595.

Northern Pac. R. R. v. Austin, 135 U. S., 315.

Gerling v. Balt. & Ohio R. R., 151 U. S., 673.

This Court, through Mr. Justice Bradley, in the case of *Ayers v. Watson*, 113 U. S., 595, draws the distinction clearly between questions of jurisdiction and questions of procedure :

“Diverse citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential and can not be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield & Coldwater Ry. Co. v. Swan*, 111 U. S., 379. Application in due time and proffer of proper bond, as required by the third section, are also essential if insisted on, but, according to ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or any informalities in the petition, provided it states the jurisdictional facts, and if these are not properly stated, there is no good reason why an amendment should not be allowed so that they may be properly stated. So it seems to us there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It is not in its nature a jurisdictional matter, but a mere rule of limitation.

In some of the older cases the word jurisdiction is often used somewhat loosely, and, no doubt, cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the Court. We do not so regard it, and since the removal was affected at the instance of the party who now makes the objection, we think that he is estopped.”

Practically the same point was decided in *French v. Stewart*, 22 Wall., 238.

In the case of *Gerling, admr., etc., v. Balt. & Ohio R. R.*, 151 U. S., 673, this Court emphatically held, that the time of filing a petition in the state court for the removal of a cause to the United States Circuit Court, is not a fact in its nature essential to the jurisdiction of the national court, and that the objection as to the time of filing of petition may be waived, by the conduct of parties to the cause.

In the case cited, a removal had been taken from the state to the national court. After the case had proceeded to trial in the national court, the objection was made that the petition for removal had been filed too late in the state court, and that, therefore, the United States Court *obtained no jurisdiction* by the filing of the record in that Court.

This Court, in passing upon the question, finds that the petition for removal had been filed too late in the state court; but it also held that the plaintiff in the cause, by going to trial in the national court, had waived its right to objection upon that point. The Court, through Mr. Justice Gray, says :

“The question therefore arises whether the objection to the time of filing of the petition for removal can be raised for the first time in this Court, or must be held to have been waived by not taking it below.

“The time of filing the petition for removal of a case from a state court into the Circuit Court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court, under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different states. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant, who does not seasonably object, that the suit is brought in the wrong district.”

Mr. Justice Gray reviews fully the case of *Ayers v. Watson*, 113 U. S., 595, above cited, and the reasoning of Mr. Justice Bradley in the case. He approves both the reasoning and decision of the case in the following language :

"His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is the subject of waiver and estoppel alike." * * *

"The decision in *Ayers v. Watson* (113 U. S., 595), as to the waiver in the Circuit Court of the United States of the objection that the petition for removal had not been seasonably filed in the state court, has never been doubted or qualified."

And finally says the Court :

"The result is, that an objection to the exercise by the Circuit Court of the United States of jurisdiction over a case otherwise removable, upon the ground that the petition for removal was filed too late, is an objection that may be waived, and that it has been waived in the case at bar."

Gerling v. Balt. & Ohio R. R., 151 U. S., 691.

While it is true that, under the decision last cited, the waiver of the objection to the filing of a petition for removal arose from the conduct of the parties to the suit in the Circuit Court of the United States, in failing to make objections seasonably in that Court; yet the principle established is, that the objection to the petition for removal in the state court, upon the ground that it was not filed in due time, does not raise a jurisdictional question or put in issue the jurisdiction of the national court.

The reason for the rule is clearly stated by Mr. Justice Gray, in *Gerling v. Balt. & Ohio R. R. Co.*, above cited, in reviewing the decision of Mr. Justice Bradley in the case of *Ayers v. Watson* :

"In that case, it is true, it was the party who had removed the case into the Circuit Court of the United States who afterwards objected to the jurisdiction of that court, because the removal was not in time, and was estopped to do so. But if due time of removal had been made, by act of Congress, a jurisdictional fact, neither party could waive or be estopped to set up the want of it; but, as has been observed by Mr. Justice Bradley in the passage above quoted, and directly adjudged in *Mansfield & C. Ry. Co. v. Swan* (111 U. S., 379), cited by him, the fact would be absolutely essential, and the want of it would be error at any stage of the cause, even though assigned by the party at whose instance it was committed."

Gerling v. Balt. & Ohio R. R., 151 U. S., 690.

A jurisdictional fact can not be waived.

Mansfield, etc., R. R. v. Swan, 111 U. S., 379.

Metcalf v. City of Watertown, 128 U. S., 586.

If a fact or a question can be *in any way*, or *in any manner* waived, such fact or question is not a jurisdictional fact or question.

If the question raised in this case is not a jurisdictional question, then the question of jurisdiction of the United States Circuit Court in this case, *is not "in issue."*

Proceedings in error lie directly from the Circuit Court to this Court only in a case, "in which the jurisdiction of the Court is in issue." (26 U. S. Stat., 827).

We might here rest the case for the defendant in error, in confidence that the proceedings in error must be dismissed as not involving a jurisdictional question, but it may be said that the plaintiff in error did raise the objection in the Circuit Court of the United States, that the petition for removal had not been filed in time in the state court, and that therefore he had not waived his objection, and is not now estopped on that question. This is begging the question. It raises *an issue of fact* as to whether or not

the plaintiff in error had in fact by his conduct waived his right to object to the filing of the petition for removal in the state court. This question of fact was decided by the Circuit Court adversely to the plaintiff in error. It may have been an erroneous judgment of the Circuit Court (although we think it a most righteous judgment), to which error might have been prosecuted. Such error can not, however, be prosecuted to this Court. Error would lie only (on such a question) to the Circuit Court of Appeals, which Court, under Section 6 of the act creating Court of Appeals (26 U. S. Stat., 827), has final and exclusive jurisdiction upon all questions decided by the Circuit Court, excepting those involving the jurisdiction of that Court. Many questions may arise in a removal suit upon motions to remand to the state court, that will not put in issue the jurisdiction of the Court. To illustrate :

The Circuit Court may be required to determine, upon evidence, the question of fact as to the diverse citizenship of the parties plaintiff and defendant. Will it be contended that the decision of the Court, upon such an issue of fact, is reviewable *by this Court* as involving the jurisdiction of the Court? Again, in order to remove a case, a separate controversy must exist. The existence of a separate controversy must be determined by the allegations of the petition for removal. Such a determination is simply the construction of a pleading. Can it be contended that the ruling of the Court upon this question of construction will involve a question of the jurisdiction of the Circuit Court, that is reviewable by proceedings in error *to this Court*? Again, the question may arise, as in this case, that the plaintiff in the state court had been guilty of such fraudulent conduct as estopped him from objecting to the filing of the petition for removal out of time. The Circuit Court of the United States might, upon such an issue of fraud, hear evidence and pass upon the question of fraud, as the Court in this case did upon affidavits and other evidence. If the

correctness of the ruling of the Circuit Court, upon the issue thus made can be construed as raising an issue of jurisdiction, then this Court may be called upon at any time to review the judgment of the Circuit Court upon an issue of fact.

The jurisdictional facts must appear from the record, in this case from the petition for removal, which, if uncontroverted, establishes jurisdiction. The other questions are questions of fact that arise from *a denial of the allegations of the petition* for removal. The Court may err in deciding these questions of fact, which error is reviewable in a proper way, but behind such questions is the *undeniable, uncontroverted fact that the jurisdiction of the Circuit Court in this case depends entirely upon the citizenship of the parties to the suit, and that there is no issue in the case upon that question*. Can it be contended that the jurisdiction so obtained can be made dependent upon evidence of *other facts* relating to any act, or agreement of consent, dissent, waiver, or estoppel of the parties litigant?

Section 6 of the act of Congress creating the Circuit Courts of Appeal provides that the judgment and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction of the Court is dependent entirely upon the opposite parties to the suit being citizens of different states, except as is provided in Section 5 of said act. One of the exceptions of Section 5 is where the jurisdiction of the Circuit Court is at issue in the case.

Construing these sections, this Court has held that :

"Where the requisite citizenship of the parties appears and the subject matter is such that the Court is competent to deal with it, the jurisdiction of that Court attaches. If any error is committed in the exercise of such jurisdiction, it can only be remedied by an appeal to the Circuit Court of Appeals."

Smith v. McKay, 161 U. S., 355.

This case is decisive, we think, of the case at bar.

In the cited case a suit in equity was brought in the United States Circuit Court, for the District of Massachusetts, by a citizen of the state of Rhode Island, against citizens of the state of Massachusetts, alleging a lease, by the complainant to the defendant, of certain patented devices; a failure upon the part of the defendant to comply with the terms of the lease, with a prayer for discovery, accounting, payment of rent, and for an injunction restraining the defendants from using the patented machine until they had fully paid the amount found due. The defendants filed an answer, responding to the allegations of the bill, and averring that the complainant had a plain, adequate and complete remedy at law. Defendants also filed a special motion to dismiss the bill, upon the ground that the United States Circuit Court had no equitable jurisdiction of the case.

The Court overruled the motion to dismiss, ordered an account, and upon final hearing rendered a judgment for complainant in the sum of five thousand dollars.

From this decree an appeal was allowed from the Circuit Court to this Court, upon the question of the jurisdiction of the Circuit Court alone. And the case was so certified.

A motion was made in this Court to dismiss the appeal, because there was no right of appeal to this Court in a case such as was presented by the record.

The Court, after stating that the case had been certified to this Court, upon an issue of jurisdiction alone, under Section 5 of the act of March 3, 1891, and after stating the appellee's ground for the motion to dismiss the appeal, i. e., that the controversy did not involve an issue of jurisdiction of the Circuit Court, Mr. Justice Shiras delivering the opinion, says:

"We regard this as a second exposition of the law, and applied to the case now in hand demands a

dismissal of the appeal, on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainant's bill. The appellant's contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity in which the defendant should choose to file a demurrer, on the ground that there was a remedy at law.

"When the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that Court attaches, and whether the Court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error was committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals."

Smith v. McKay, 161 U. S., 359.

To the same effect are the following cases :

Borgmeyer v. Idler et al, 159 U. S., 408.

Colorado Mining Co. v. Turck, 150 U. S., 138.

Ex parte Jones, 164 U. S., 691.

In the case at bar, we submit, the citizenship of the parties appears—the jurisdictional amount is conceded. By the filing of the transcript in the United States Circuit Court the jurisdiction of that Court attached, and its judgment, upon the pleadings, evidence and motion to remand, was a valid exercise of jurisdiction, that can only be reviewed by proceedings in error to the Circuit Court of Appeals.

We respectfully submit that the writ of error in this case should be dismissed.

CHARLES B. SIMRALL,
Attorney for Defendant in Error.